

ORIGINAL

3

Supreme Court, U.S.
FILED

OCT 15 1990

JOSEPH F. SPANIO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-5721

PERVIS TYRONE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

RECEIVED

OCT 15 1990

OFFICE OF THE CLERK,
SUPREME COURT, U.S.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES W. BURSON
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-6439

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-5721

PERVIS TYRONE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Tennessee, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Supreme Court of Tennessee in this case.

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 791 S.W.2d 10.

JURISDICTION

The opinion of the Supreme Court of Tennessee was filed on April 16, 1990. Justice Scalia signed an order on June 29, 1990, extending the time for filing a petition for a writ of certiorari until September 13, 1990. The petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the introduction of a video tape of a homicide scene made more than one hour after the offense violated petitioner's rights under the Eighth and Fourteenth Amendments by preventing the jury from making a reasoned, moral decision on whether to impose the death penalty;

2. Whether the introduction of victim impact evidence, when combined with the statements and conduct of the Assistant District Attorney General for the State of Tennessee, denied petitioner's rights under the Eighth and Fourteenth Amendments;

3. Whether a jury instruction imposing upon petitioner the burden of proving that the mitigating evidence outweighed the aggravating circumstances deprived petitioner of his right to have the jury make the individualized determination required by the Eighth and Fourteenth Amendments.

STATEMENT OF THE CASE

On February 16, 1988, a Shelby County, Tennessee, Criminal Court jury found the petitioner guilty of first-degree murder, Tenn. Code Ann. §39-2-202, in the deaths of Charisse Christopher and her daughter, Lacie, and guilty of assault with intent to commit first-degree murder, Tenn. Code Ann. §39-2-103, of her son, Nicholas. The jury sentenced the petitioner to death for each of the murders. The trial court sentenced the petitioner to thirty (30) years in the Department of Correction for the assault.

The Supreme Court of Tennessee affirmed the convictions and sentences on April 16, 1990. State v. Payne, 791 S.W.2d 10 (Tenn. 1990). The execution of the petitioner's death sentences has been stayed by the Supreme Court of Tennessee pending review of the instant petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Question one does not merit the granting of review.

The petitioner contends that the introduction at the sentencing hearing of a videotape of the crime scene was (1) erroneous under state law and (2) deprived the petitioner of his rights under the Eighth and Fourteenth Amendment.

Whether the evidence was admissible at the sentencing hearing is a matter of state evidentiary law and does not present a federal question. Essentially, the petitioner is asking the Court to supervise state evidentiary law. However, this Court has no supervisory jurisdiction over state courts and, in reviewing a state court judgment, is confined to evaluating it in relation to the federal constitution. Chandler v. Florida, 449 U.S. 560, 570 (1981).

In any event, the introduction of the videotape did not violate the Eighth Amendment. As the Tennessee Supreme Court noted, the videotape was relevant to an aggravating circumstance asserted by the State, i.e., that the murder "was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind", Tenn. Code Ann. §39-2-203(i)(5). State v. Payne, 791 S.W.2d at 19-20. Although the videotape is certainly unpleasant, it is not

gruesome or so graphic as to suggest a decision by the jury on an improper basis resulting in a death sentence "imposed out of whim, passion, prejudice or mistake." See generally Eddings v. Oklahoma, 455 U.S. 104, 118 (1982). The Supreme Court of Tennessee properly conducted a weighing of the probative value of the evidence versus the danger of unfair prejudice. Review of the question presented should be denied.

2. The cases relied upon by the petitioner in question two are distinguishable on their facts; in any event, if error was committed, it was harmless beyond a reasonable doubt and furnishes no basis for this Court's review.

The petitioner contends that the testimony of Nicholas Christopher's grandmother regarding his reaction to the loss of his mother and sister, and the prosecutor's jury argument about the physical and mental harm to Nicholas by the petitioner, constituted inadmissible victim impact statements prohibited under this Court's decisions in Booth v. Maryland, 483 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207 (1989).

In both Booth and Gathers, this Court found that the inherent problem with victim impact statements is their tendency to introduce factors wholly unrelated to the blameworthiness of the particular defendant. The Court has repeatedly emphasized that in imposing the death penalty, the

"punishment must be tailored to [the defendant's] personal responsibility and moral guilt." Booth, supra, 483 U.S. at ___, 107 S.Ct. at 2533, citing Enmund v. Florida, 458 U.S. 782 (1982). However, where it can be shown that the information relates directly to the circumstances of the crime or the defendant's moral culpability, the information is relevant and admissible. Gathers, supra, 490 U.S. at ___, 109 S.Ct. at 2211.

In this case, the testimony and argument regarding Nicholas' emotional trauma related not only to the circumstances of the crime but to the moral culpability of the defendant as well. The circumstances of this crime involved the brutal slayings of Nicholas' mother and only sibling to which he was an eyewitness and victim. The testimony and argument was also relevant to one of the statutory aggravating factors, that is, whether the murders were heinous, atrocious, or cruel in that they involved torture or depravity of mind. Part of what makes the crime in this case so heinous and cruel (to inflict suffering) is that it involved the murder of Nicholas' mother and infant sister. In this case, it cannot be said that the testimony and argument were wholly unrelated to the circumstances of the crime or the defendant's moral culpability. Unlike the situations in Booth and Gathers, here the defendant's level of culpability was dependent upon circumstances over which he

had control, not upon fortuitous circumstances such as the composition of the victim's family or the victim's possession of religious items. In this case, the fact that Nicholas expresses grief over the loss of his family members is clearly attributable to the act of will of the petitioner.

Additionally, unlike the factual situations in Booth and Gathers, the testimony and argument in this case were not voluminous or detailed and constituted only a portion of the State's case. The assailed matters are insignificant in comparison with the large package of traits involved in Booth that added up to a Victim Impact Statement. Moreover, the jury was not instructed that it was to consider such proof in determining the appropriate punishment for the petitioner.

Finally, to the extent that the matters complained of might be deemed irrelevant and inadmissible, the error was harmless beyond a reasonable doubt. Given the minimal scope of the testimony and argument and the overwhelming evidence justifying the death penalty, it is beyond a reasonable doubt that the error complained of did not contribute to the jury's verdict. See Satterwhite v. Texas, 486 U.S. 249 (1988). The question presented does not warrant the granting of certiorari.

3. This Court's prior decisions demonstrate that review of question three is unwarranted.

The petitioner contends that a jury instruction imposing upon a defendant the burden of proving that the mitigating circumstances outweighed the aggravating circumstances violated the Eighth Amendment.

First, the jury instruction in this case, consistent with the Tennessee Supreme Court's construction of Tennessee's death penalty statute, placed no such burden upon the petitioner. See State v. Thompson, 768 S.W.2d 239, 251, 252 (Tenn. 1989).

Second, this Court rejected a similar contention in Blystone v. Pennsylvania, ____ U.S. ____, 110 S.Ct. 1078 (1990), and Boyde v. California, ____ U.S. ____, 110 S.Ct. 1190 (1990). In Blystone, this Court, quoting from its opinion in McCleskey v. Kemp, 481 U.S. 279 (1987), summarized the constitutional requirements for death penalty statutes as follows:

In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrowed the decision maker's judgment

as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents the state from imposing the death penalty for that offense. Second, consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the state cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Blystone, ____ U.S. ____, 110 S.Ct. at 1084. Like the Pennsylvania statute, Tennessee's statute and jury instructions meet those requirements by requiring the finding, beyond a reasonable doubt, of an aggravating circumstance or circumstances as a threshold to the imposition of the death penalty, and by permitting the jurors to consider any mitigating circumstance or circumstances. There is no constitutional impediment to requiring the imposition of a sentence of death in accordance with the jury instructions in this case. The granting of certiorari on this issue is unwarranted.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-6439

Counsel for Respondent